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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
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12 JAMES EMMETT FARR,
13 Plaintiff,
14 v.
15 DANIEL PARAMO, Warden, et al.,
16 Defendants.
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Case No.: 16-cv-1279-JLS (MDD)

**ORDER (1) ADOPTING REPORT
AND RECOMMENDATION; AND (2)
GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS**

(ECF Nos. 30, 35)

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19 Presently before the Court is Magistrate Judge Michael D. Dembin's Report and
20 Recommendation ("R&R"), (ECF No. 35). Judge Dembin recommends that the Court
21 grant in part and deny in part Defendants' Partial Motion to Dismiss, (ECF No. 30).
22 Petitioner filed objections to the R&R, ("Objections," ECF No. 39).

23 Having considered the Parties' arguments and the law, the Court rules as follows.

24 **BACKGROUND**

25 Judge Dembin's Report and Recommendation contains a complete and accurate
26 recitation of the relevant portions of the factual and procedural histories underlying
27 Defendants' pending Motion to Dismiss. (*See* R&R 1–7.) This Order incorporates by
28 reference the background as set forth therein.

LEGAL STANDARD

Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district court's duties regarding a magistrate judge's report and recommendation. The district court "shall make a de novo determination of those portions of the report . . . to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(c); *see also United States v. Raddatz*, 447 U.S. 667, 673–76 (1980). In the absence of a timely objection, however, "the Court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72 advisory committee's note (citing *Campbell v. U.S. Dist. Court*, 510 F.2d 196, 206 (9th Cir. 1974)).

ANALYSIS

I. Summary of R&R Conclusions

Judge Dembin recommends the Court: 1. Dismiss without prejudice Plaintiff's Eighth Amendment excessive force claim as to Defendants Amaro and Frink; 2. Grant Plaintiff's Eighth Amendment excessive force claim as to Defendants Ramrakha, Hernandez, and Bernard; 3. Dismiss with prejudice Plaintiffs' Fourteenth Amendment Due Process Claim as to all Defendants; 4. Dismiss without prejudice Plaintiff's Respondeat Superior/*Monell* Claim against Defendant Paramo; 5. Dismiss with prejudice Plaintiff's negligence claim against Defendant Paramo; 6. Dismiss without prejudice Defendants Savala and Ramirez from this action; 7. Find Plaintiff has not sufficiently pled conspiracy under § 1983; 8. Find Plaintiff has not adequately pled a First Amendment retaliation claim; 9. Dismiss without prejudice Plaintiff's Eighth Amendment deliberate indifference claim. (*See generally* R&R.)

Plaintiff filed a lengthy objection, objecting to various portions of the R&R and reiterating many of his allegations. The Court will review, *de novo*, those parts of the R&R to which Plaintiff objects and will review for clear error the parts of the R&R to which Plaintiff does not object.

II. Eighth Amendment Claim

Plaintiff alleges Defendants Amaro, Fink, Ramrakha, Hernandez, and Bernard violated Plaintiff's Eighth Amendment right to be free from cruel and unusual punishment "when they physically assaulted Plaintiff." ("Compl.," ECF No. 1, ¶ 17.) Judge Dembin found there is no evidence Defendants Amaro and Fink were present during or involved in the alleged use of excessive force. (R&R 8–9.) Plaintiff does not directly object to this finding, but does state "[e]ven the employees who did not actively participate in the individual levels of criminality, either witnessed it, or knew all about it" and did not prevent it. (Objection ¶ 43.) This does not show involvement. The Court therefore agrees with Judge Dembin that "Plaintiff cannot bridge the pleading gap with vague and speculative allegations of conspiracy or vicarious liability" as to these Defendants Amaro and Fink. (R&R 9.) Defendants concede the claim is sufficiently pled as to Defendants Ramrakha, Hernandez, and Bernard. (*Id.* at 8.) The Court **ADOPTS** the R&R as to this claim, **GRANTING** the Motion to Dismiss this claim as to Defendants Amaro and Fink, and **DENYING** the Motion to Dismiss this claim as to Defendants Ramrakha, Hernandez, and Bernard.

III. Fourteenth Amendment Due Process Claim

Plaintiff alleges Defendants Amaro, Fink, Ramrakha, Hernandez, and Bernard violated his Fourteenth Amendment right when they "stole Plaintiff's personal property and / or allowed other inmates to steal Plaintiff's property." (Compl. ¶ 17.) Judge Dembin found "[a] deprivation or destruction of a prisoner's property does not violate the prisoner's due process rights under the 14th Amendment so long as the state provides a post-deprivation remedy." (R&R 10 (citing *Hudson v. Palmer*, 468 U.S. 517, 534 (1984); and *Barnett v. Centoni*, 31 F.3d 813, 817 (9th Cir. 1994)).) Judge Dembin found although California provides an adequate post-deprivation remedy for property deprivation, Plaintiff "concedes that he has failed to seek post-deprivation remedies in state court." (*Id.*) In his Objections, Plaintiff does not address this claim. The Court agrees with Judge Dembin and **ADOPTS** the R&R and **DISMISSES** this claim. The Court finds no amendment can cure

1 Plaintiff's failure to seek post-deprivation remedies in state court and, therefore, the
2 dismissal is **WITH PREJUDICE**.

3 **IV. Respondeat Superior/*Monell* Claim**

4 Plaintiff claims Defendant Paramo violated Plaintiff's Eighth Amendment right "in
5 that [Paramo] maintained inadequate policies and procedures" with respect to the prison's
6 grievance and inmate complaint procedures. Judge Dembin found Plaintiff had not
7 sufficiently alleged a respondeat superior claim against Defendant Paramo in either his
8 individual or official capacity. (R&R 11–12.) Judge Dembin found first, Plaintiff does not
9 allege Defendant Paramo's direct involvement in the incident, and second, government
10 officials cannot be held liable under § 1983 for their subordinates' conduct merely because
11 the official is the supervisor. (R&R 12 (citing cases).) As to the *Monell* claim, Judge
12 Dembin found Plaintiff only included conclusory allegations about Defendant Paramo's
13 involvement and has not alleged a plausible claim. (*Id.*)

14 Plaintiff objects to this finding. Plaintiff alleges on November 6, 2014,¹ Plaintiff
15 personally notified Defendant Paramo that Plaintiff was accusing his staff of criminal
16 behavior. (Objections ¶ 34.)² Plaintiff states "this issue is not a matter of respondeat
17 superior, but of liability based on [Paramo's] personal knowledge and his failure to err on
18 the proper side of legality." (*Id.* ¶ 34.) Although Plaintiff attempts to circumvent the
19 phrase "respondeat superior," it stands that there is no respondeat superior liability under
20 § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437–38 (9th Cir. 1993); *see also Hunt v.*
21 *Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989) (supervisor is not "vicariously liable for
22 the fault of personnel" at the prison). The Court views Plaintiff's objection as one to Judge
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24 ¹ The incident occurred on November 1, 2014.

25 ² This information appears nowhere in Plaintiff's Complaint and Plaintiff has therefore waived his right
26 to present it here. *See Marshall v. Chater*, 75 F.3d 1421, 1426–27 (10th Cir. 1996) ("Issues raised for the
27 first time in objections to the magistrate judge's recommendation are deemed waived."); *see also United*
28 *States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000) (holding that the district court, in reviewing objections
to a magistrate judge's report and recommendation, is not required to consider evidence that was not
presented to the magistrate judge). Even if the evidence was timely presented, the Court determines the
objection does not demonstrate any error in Judge Dembin's finding.

1 Dembin’s finding regarding Defendant Paramo’s personal liability. Plaintiff’s objections
2 do not cure him of the underlying issue identified by Judge Dembin: Plaintiff must allege
3 Defendant Paramo’s personal involvement. Allegations that Defendant Paramo knew of
4 the other officers’ actions after the fact do not show Paramo’s direct involvement. (R&R
5 12 (finding the allegation that Plaintiff and his wife wrote letters to Defendant Paramo after
6 the November 1, 2014 incident do not show Paramo’s direct involvement in the incident).)³
7 The Court agrees with Judge Dembin.

8 As to the *Monell* claim, under *Monell v. N.Y.C. Dep’t of Social Servs.*, 436 U.S. 658
9 (1978), a municipality, its agencies, or its officials can be held liable under § 1983 if a
10 constitutional deprivation arises pursuant to a governmental custom even though the
11 custom has not been formally approved through official decision-making channels. *Id.* at
12 690. The Court agrees Plaintiff has not alleged such a plausible practice or custom that
13 was used to cause Plaintiff’s alleged injuries. The Court **ADOPTS** the R&R and
14 **DISMISSES** this claim. The Court agrees it is possible Plaintiff could cure the deficiencies
15 in his Complaint as to this claim by pleading additional facts showing Defendant Paramo
16 had some personal involvement in the alleged violation of his rights or by pleading facts
17 sufficient to establish a *Monell* claim. Therefore the dismissal is **WITHOUT**
18 **PREJUDICE**.

19 V. Negligence Claim

20 Plaintiff alleges Defendant Paramo was negligent in, among other things, not
21 correcting the prison policies, ignoring the pattern of prior grievances, and maintaining a
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23 ³ In order to establish liability against a supervisor, a plaintiff must allege facts
24 demonstrating (1) his or her personal involvement in the constitutional deprivation, or (2)
25 a sufficient causal connection between the supervisor’s wrongful conduct and the
26 constitutional violation. The “sufficient causal connection” may be shown by evidence
27 that the supervisor “implement[ed] a policy so deficient that the policy ‘itself is a
28 repudiation of constitutional rights.’” However, an individual’s “general responsibility for
supervising the operations of a prison is insufficient to establish personal involvement.”
Wesley v. Davis, 333 F. Supp. 2d 888, 892 (C.D. Cal. 2004) (internal citations omitted). The Court agrees
Plaintiff has not alleged sufficient facts to show Defendant Paramo’s personal involvement or a sufficient
casual connection to Plaintiff’s alleged injuries.

1 system of inadequate training. (Compl. ¶¶ 22–25.) Judge Dembin found this claim fails
2 because Plaintiff has not alleged he complied with California’s Government Tort Claims
3 Act (“Act”). (R&R 13.) Under the Act, Plaintiff was required to present his claim to the
4 Victim Compensation and Government Claims Board within six months of the incident.
5 The incident occurred on November 1, 2014 and Plaintiff did not file his claim until more
6 than a year later. (*Id.*) Plaintiff’s claim was denied and Plaintiff does not allege he
7 petitioned for relief from the claims presentation requirement before bringing his action.
8 (*Id.*)

9 Plaintiff objects to this, arguing he was delivered an adverse response of rejection
10 and denial of his claim. (Objections ¶ 39.) While this may be true, his claim was still
11 untimely filed and Plaintiff has not been granted relief from the claims presentation
12 requirement. Plaintiff also argues “a VCB claim by a prisoner against a public employee
13 Defendant[] is not required.” (*Id.* ¶ 40.) The Court disagrees and finds no valid basis for
14 this argument. Judge Dembin also found Defendant Paramo is immune from liability as it
15 relates to this claim. Plaintiff does not object to this finding. The Court agrees with Judge
16 Dembin and **ADOPTS** the R&R, **DISMISSING** this claim. The Court finds no amendment
17 to the Complaint could cure Plaintiff’s failure to comply with the Act, thus, this dismissal
18 is **WITH PREJUDICE**.

19 **VI. Defendants Savala and Ramirez**

20 Judge Dembin found Plaintiff did not include these Defendants’ names in his three
21 enumerated claims and has only alleged these Defendants were witnesses to the underlying
22 event and included “threadbare allegations of conspiracy and retaliation.” (R&R 14.) In
23 his Objections, Plaintiff alleged Defendant Savala is liable based on his personal
24 knowledge and failure to act, and attached an “Administrative Segregation Unit Placement
25 Notice” drafted by Defendant’s Savala. (Objections p. 13–17.) A portion of this document
26 was previously attached as Exhibit 5 to Plaintiff’s Complaint. (ECF No. 1-2, at 64). This
27 document does not show Defendant Savala’s direct involvement in any alleged
28 constitutional deprivation. The evidence shows Defendant Savala filled out a form

1 detailing the reason for Plaintiff's placement in the segregation unit. (*Id.* (describing
2 Plaintiff "lunging toward" Sergeant Ramrakha).) The Court agrees with Judge Dembin
3 that Plaintiff does not allege Defendant Savala was directly involved in the use of force.
4 (R&R 15.)

5 Judge Dembin also found Plaintiff does not allege Defendant Ramirez was directly
6 involved in the use of force. (*Id.*) Plaintiff does not object to this finding. The Court
7 agrees with Judge Dembin. The Court **ADOPTS** the R&R as to this claim and
8 **DISMISSES WITHOUT PREJUDICE** Defendants Savala and Ramirez.

9 **VII. Conspiracy Allegation**

10 Plaintiff's form Complaint states a cause of action for "Conspiracy" but he does not
11 mention allegations of a conspiracy throughout the Complaint. (*See* Compl. 1.) Judge
12 Dembin found, to the extent Plaintiff included a claim for conspiracy, Plaintiff had not
13 adequately pled a conspiracy. (R&R 15–16.) In his Objections, Plaintiff claims his entire
14 claim is "submitted as a Conspiracy of Retaliation." (Objections ¶ 2.) But Plaintiff points
15 to no allegations in his Complaint that support a claim of conspiracy under § 1983. To the
16 extent Plaintiff has brought a claim of conspiracy under § 1983, the Court agrees with the
17 R&R and **DISMISSES WITHOUT PREJUDICE** this claim.

18 **VIII. First Amendment Retaliation Allegations**

19 Judge Dembin found, construing Plaintiff's allegations liberally, that Plaintiff
20 alleges Defendants "used excessive force in retaliation for Plaintiff exercising his First
21 Amendment rights to petition the courts as a class action plaintiff and through the prison
22 grievance system." (R&R 16.) Plaintiff states this his entire case is one of retaliation, and
23 provides that he has filed many staff complaints and that he was a party in a major litigation
24 against the California Department of Corrections and Rehabilitation. (Objections ¶¶ 44–
25 45.) But the Court agrees that Plaintiff has not shown the alleged retaliatory action "does
26 not advance legitimate penological goals." (R&R 17 (quoting *Barnett v. Centoni*, 31 F.3d
27 813, 815–16 (9th Cir. 1994) (per curiam) (holding a prisoner suing officials under § 1983
28 for retaliation must show he was retaliated against for exercising his constitutional rights

1 and that the retaliatory action does not advance legitimate penological goals)).) The Court
2 agrees with the R&R and, to the extent Plaintiff alleged a retaliation claim, the Court
3 **DISMISSES WITHOUT PREJUDICE** this claim.

4 **IX. Eighth Amendment Deliberate Indifference**

5 Plaintiff alleges the Defendants were deliberately indifferent to his medical needs
6 when they failed to ensure treatment for the injuries and delayed his access to medical care
7 after the incident. (Compl. ¶ 3.) Judge Dembin found Plaintiff has failed to show the
8 subjective prong of this claim, that any of the Defendants consciously disregarded
9 Plaintiff's needs after he was assaulted. (R&R 19.) The Court agrees. In fact, Plaintiff
10 produced a document that shows he refused medical care on the date of the incident. (ECF
11 No. 1-2, at 35.)⁴ Even without this evidence, Plaintiff has made no allegations that any
12 specific Defendant named in the Complaint consciously disregarded to his needs. (*See*
13 R&R 18–19 (“The official must have been aware of facts or factual circumstances that
14 would allow him to draw the inference that a substantial risk of serious harm to the inmate’s
15 health and safety exists, and he must also draw that inference.” (citing *Famer v. Brennan*,
16 511 U.S. 825, 837 (1994))).) The Court agrees with Judge Dembin and **ADOPTS** the R&R
17 as to this claim.

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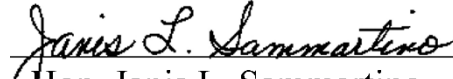
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26 ⁴ In his Complaint, Plaintiff argues there are conflicting medical documents because one document shows
27 he refused care and another document shows he was treated and released. (ECF No. 1-2, ¶ 17 (citing
28 Medical Documents 2 and 3, (ECF No. 1-2, at 31–37))).) But Medical Document 2, which details the
treatment Plaintiff received, is dated September 2, 2014. Medical Document 3, which states Plaintiff
“refused medical care;” “refused to answer questions;” and was “uncooperative[,]” is dated November 1,
2014, the date of the incident.

1 **CONCLUSION**

2 For the reasons stated above, the Court (1) **OVERRULES** Plaintiff's objections; (2)
3 **ADOPTS** Judge Dembin's R&R, (ECF No. 35); and (3) **GRANTS IN PART AND**
4 **DENIES IN PART** Defendants' Motion to Dismiss, (ECF No. 30), as detailed herein.

5 **IT IS SO ORDERED.**

6 Dated: December 18, 2017

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8 Hon. Janis L. Sammartino
9 United States District Judge
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